LIBRARY
SUPREME COURT, U.S.

7

Office - Supreme Court, U. S.
FILED
MAR 23 1949

IN THE

Supreme Court of the United States

October Term, ~~1948~~ '49

No. ~~667~~ 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

W. J. DURHAM,
WILLIAM H. HASTIE,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
THURGOOD MARSHALL,
Attorneys for Petitioner.

ROBERT L. CARTER,
E. B. BUNKLEY, JR.,
HARRY BELLINGER,
U. S. TATE,
Of Counsel.

TABLE OF CONTENTS

PAGE

PETITION FOR WRIT OF CERTIORARI

PART ONE—Summary Statement of the Matter Involved 2

I. Statement of the Case 2

First Hearing 3

Second Hearing 3

Hearing on the Merits 3

II. Summary of Testimony 5

A. The Two Law Schools 6

Physical Plant 7

Library 7

Faculty 7

Student Body 7

B. The Unreasonableness of Compulsory Racial Segregation in Public Legal Education 9

C. Inequalities Inherent in Segregated School Facilities 11

PART TWO—Opinion of the Court Below 12

PART THREE—Jurisdiction 13

PART FOUR—Question Presented 13

PART FIVE—Reasons Relied Upon for Allowance of the Writ 13

CONCLUSION 14

PAGE

BRIEF IN SUPPORT THEREOF

Opinion of the Court Below 15

Jurisdiction 15

Statement of the Case 16

Errors Relied Upon 16

ARGUMENT

I. The question whether a state which undertakes to provide legal education for any of its citizens can satisfy the requirements of the equal protection clause of the Fourteenth Amendment by establishing a law school for Negroes separate from the law school it provides for all other persons is of great public importance and should be decided by this Court in this case 17

II. The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy* v. *Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions should lead this Court to review and disavow the doctrine of *Plessy* v. *Ferguson* 23

III. This Court should review and reverse the judgment below to prevent the several states from being free to restrict Negroes to public educational facilities clearly inferior to those provided for all other persons similarly situated through the device of arbitrary judicial decision that such discriminatory action provides "substantial equality" 28

CONCLUSION 33

Table of Cases

	PAGE
Atchison Topeka & Santa Fe R. R. Co. v. Vosburg, 238 U. S. 56	27
Berea College v. Kentucky, 211 U. S. 45	26
Bluford v. Canada, 32 F. Supp. 707	29
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28	26
Buchanan v. Warley, 245 U. S. 60	25
Colgate v. Harvey, 296 U. S. 404	14, 27
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	27
Cory v. Carter, 48 Ind. 337	24
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79	27
Cummings v. County Board of Education, 175 U. S. 528	23, 24
Dawson v. Lee, 83 Ky. 49	24
Ex Parte Virginia, 100 U. S. 339	26
Fisher v. Hurst, 333 U. S. 147	25, 30
Gong Lum v. Rice, 275 U. S. 78	23, 24, 25
Gulf Colorado & Sante Fe R. Co. v. Ellis, 165 U. S. 150	27
Hall v. DeCuir, 95 U. S. 485	23, 26
Hartford Steam Boiler Insurance and Inspection Co. v. Harrison, 301 U. S. 459	27
Hill v. Texas, 316 U. S. 400	25
Johnson v. Board of Trustees (File No. 625, U. S. Dist. Court for the Eastern District of Kentucky)	30

PAGE

Lehew v. Brummell, 103 Mo. 546 24

Louisiana ex rel. Hatfield v. Louisiana State University (File 25,550, State Court for the 19th Judicial District) 30

Louisville Gas & Electric Company v. Cohen, 277 U. S. 32 27

Mayflower Farms v. Ten Eyck, 297 U. S. 266 27

McCabe v. Atchison Topeka & Santa Fe R. Co., 235 U. S. 151 ..... 23, 26

McLaurin v. Oklahoma State Regents, et al., No. 614, October Term, 1948 30

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 ..... 23, 25, 29

Mitchell v. United States, 313 U. S. 80 26

Morgan v. Virginia, 328 U. S. 373 26

Oyama v. California, 332 U. S. 633 ..... 14, 25

Pearson v. Murray, 169 Md. 478 30

People v. Gallagher, 93 N. Y. 438 24

Plessy v. Ferguson, 163 U. S. 537 ..... 14, 23, 24, 25, 28, 29

Powers Mfg. Co. v. Saunders, 274 U. S. 490 27

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 27

Royster Guano Co. v. Virginia, 253 U. S. 412 27

Roberts v. Boston, 5 Cush. (Mass.) 198 24

Shelley v. Kraemer, 334 U. S. 1 ..... 14, 25

Sipuel v. Board of Regents, 332 U. S. 631 ..... 2, 23, 25, 30

Skinner v. Oklahoma, 316 U. S. 535 27

Smith v. Cahoon, 283 U. S. 553 27

PAGE

Southern Ry. Co. v. Greene, 216 U. S. 400 27

State, ex rel. Michael v. Whitham, 179 Tenn. 250 29

State, Garnes v. McCann, 21 Ohio St. 210 24

Strauder v. West Virginia, 100 U. S. 303 25

Takahashi v. Fish & Game Commission, 332 U. S. 410 ..... 14, 25

Truax v. Corrigan, 257 U. S. 312 27

Truax v. Raich, 239 U. S. 33 26

Virginia v. Rieves, 100 U. S. 313 26

Ward v. Flood, 48 Cal. 36 24

Wrighten v. Board of Trustees, 72 F. Supp. 948 ..... 24, 29

Yick Wo v. Hopkins, 118 U. S. 356 25

Other Authorities

Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of *Sarah C. Roberts* v. *Boston*, 1849 20

Ballantine, The Place in Legal Education of Evening and Correspondence Law Schools, 4 Am. Law School Rev. 369 (1918) 21

Boyer, Smaller Law Schools, Factors Affecting Their Methods and Objectives, 20 Oregon Law Rev. 281 (1941) 21

"Higher Education for American Democracy," *A Report of the President's Commission on Higher Education*, U. S. Government Printing Office, Washington, December, 1947 19

Holmes, "The Use of Law Schools" in Collected Legal Papers (1920) 21

PAGE

Journal of Negro Education (1945), Vol. XIV, Fall Number 19

McCormick, The Place and Future of the State University Law School, 24 N. C. L. Rev. 441 ..... 21, 22

Otto Klineberg, Negro Intelligence and Selective Migration (N. Y., 1935) 22

Peterson & L. H. Lanier, "Studies on the Comparative Abilities of Whites and Negroes," Mental Measurement Monograph, 1929 22

Report of Board of Officers on Utilization of Negro Manpower in the Post-War Army (February, 1946) 18

Simpson, "The Function of a University Law School," 49 Harv. L. Rev. 1068 ..... 20, 22

Sixteenth Census of the United States, Vol. III, Part IV (1940) 20

Stone, "The Public Influence of the Bar," 48 Harv. L. Rev. 1 22

The Black and White of Rejections for Military Service, Montgomery, Ala., American Teachers Association, 1944 ..... 18, 22

"To Secure These Rights," *The Report of the President's Committee on Civil Rights*, U. S. Government Printing Office, 1947 18

Townes, Organization and Operation of a Law School, 2 Am. Law School Rev. 436 (1910) 21

IN THE

Supreme Court of the United States

October Term, 1948

No.

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas denying his application for writ of error to review the judgment of the Court of Civil Appeals which had affirmed the judgment of the District Court of Travis County dismissing petition for writ of mandamus to compel respondents to admit petitioner to the University of Texas School of Law.

PART ONE

SUMMARY STATEMENT OF THE MATTER INVOLVED

I

Statement of the Case

This case is believed to present for the first time in this Court a record in which the issue of the validity of a state constitutional or statutory provision requiring the separation of the races in professional schools is clearly raised.[1] It is the first record which contains expert testimony and other convincing evidence showing the lack of any reasonable basis for racial segregation at the professional school level, its inherent inequality and its effect on the students, the school and the state.

Over a period of two years three hearings were held in the trial court. The first presented a situation in which the state excluded Negroes entirely from its state-supported law school facilities. The second came after the state had proposed to undertake the establishment of a Negro law school, and the third hearing took place subsequent to a specific tender of segregated legal training of sorts by the state. Throughout the three hearings, petitioner challenged the validity of the constitutional and statutory provisions of the state requiring racial segregation of students and the resulting exclusion of petitioner from the law school of the University of Texas because of his race as contravening the Fourteenth Amendment.

---

[1] There are two other cases involving a similar question. *McLaurin* v. *Oklahoma State Regents, et al.*, No. 614, October Term, 1948 is now pending before this Court on direct appeal. *Sipuel* v. *Board of Regents, et al.*, 332 U. S. 631 was retried in the local court, and a record made including testimony of experts in the fields of legal training, anthropology and sociology. That case is now pending on appeal before the Supreme Court of Oklahoma.

First Hearing

On May 16, 1946 petitioner filed in the 126th District Court of Travis County, Texas, a petition for a writ of mandamus alleging that he had been refused admission to the law school of the University of Texas solely because of race and color (R. 403-408). On June 17, 1946 a hearing was held, and on June 26th the district court entered an order finding that the refusal to admit petitioner was a denial of the equal protection of the laws for the reason that no provision had been made for legal training for him. The court, however, refused to grant the writ at that time and gave the respondents six months to provide a course of legal instruction substantially equivalent to that afforded at the University of Texas setting the next hearing date for December 17th (R. 424-426).

Second Hearing

At the December 17th hearing it appeared that the state had done no more than authorize the instruction of Negroes at a non-existent law school to be established at Houston (R. 426-432). Yet, the district court entered a final order dismissing the petition for a writ of mandamus on the ground that "the said order of June 26, 1946 has been complied with in that a law school or legal training substantially equivalent to that offered at the University of Texas has now been made available to the Relator" (R. 433).

This judgment was appealed to the Court of Civil Appeals, and on March 26, 1947 the judgment of the trial court was set aside without opinion and the cause remanded generally for further proceedings without prejudice (R. 434-435).

Hearing on the Merits

On May 1, 1947 respondents filed their first amended original answer alleging that "The Constitution and laws

of the State of Texas require equal protection of the law and equal educational opportunities for all qualified persons but provide for separate educational institutions for white and Negro students" (R. 415). It was further alleged that the refusal to admit petitioner was therefore not arbitrary or in violation of the Constitution of the United States since "equal opportunities were provided for relator in another state-supported law school" (R. 415).

On May 8, 1947 relator filed his second supplemental petition pointing out that the proposed law school for Negroes did not meet the requirements of the equal protection clause and that the continued refusal to admit petitioner to the law school of the University of Texas was in violation of the Fourteenth Amendment and that "insofar as respondents claim to be acting under authority of the Constitution and laws of the State of Texas their continued refusal to admit the relator to the law school of the University of Texas is nevertheless in direct violation of the Fourteenth Amendment to the Constitution of the United States" (R. 412). It was also alleged that "such constitutional and statutory provisions of the State of Texas as applied to Relator are in direct violation of the Fourteenth Amendment to the Constitution of the United States" (R. 413).[2]

Thereafter, respondents filed their first supplemental answer reaffirming their reliance upon the validity of the provisions of the Constitution and laws of Texas requiring racial segregation in public education (R. 420).

From May 12 to May 18, 1947, hearing was had and testimony was taken before the district court, sitting without

---

[2] At the trial of this case, the responsible officials of the University of Texas made it clear that they refused admission to the petitioner because of the Constitution and laws of Texas requiring segregation of the races in public education (R. 40-41, 56, 161).

a jury, and on June 17, 1947 judgment was entered for respondents. The judgment concluded that "the constitutional right of the State to provide equal educational opportunities in separate schools being well established and long recognized by the highest state and federal courts, and the facts in this case showing that Relator would be offered equal *if not better opportunities* for the study of law in such separate school, the petition for Writ of Mandamus should be denied" (R. 440). (Italics ours.)

The Court of Civil Appeals affirmed the judgment of the lower court on February 25, 1948 (R. 445-460). Motion for rehearing was filed on March 11, 1948 (R. 461-464) and was denied on March 11, 1948 (R. 465), with opinion appearing in the record at pages 460-461.

On September 29, 1948 application for writ of error to the Supreme Court of Texas was denied without opinion, and on October 27, 1948 motion for rehearing was overruled (R. 471).

On January 12, 1949 this Court issued an order extending time to file this petition for writ of certiorari up to and including March 23, 1949 (R. 472).

II

Summary of Testimony

The testimony offered by the respondents was limited to the question of the alleged physical equality between the law school at the University of Texas and the law school for Negroes. The respondents produced no evidence to justify the state's constitutional and statutory provisions requiring the segregation of the races in public law schools. On the other hand, petitioner offered the uncontradicted testimony of expert witnesses showing: (1) that there is

no rational basis for compulsory racial segregation in public education; (2) that there are no recognizable racial differences as to capacities between students of different races; and (3) that compulsory racial segregation in public education is harmful to the students of all groups and the community. Petitioner also produced expert testimony showing that it is impossible for a law school student to get an education in a school limited to one racial group equal to that obtained in a law school to which all other groups are freely admitted. Expert testimony offered by the petitioner also showed the inevitable inequalities inherent in a public school system maintained on a basis of racial segregation.

A

The Two Law Schools

Although Negroes have always been excluded from the University of Texas because of their race or color, the State of Texas has never offered them "separate but equal" facilities (R. 56). As Dean Pettinger, a witness for respondents who has studied educational facilities for Negro and white students in Texas for thirty years, stated: "I am unable to think for the moment of colored institutions and white institutions which do have equal facilities with which I have been associated" (R. 33).

When petitioner applied for a legal education the only law school in existence maintained by the State of Texas was the one at the University of Texas (R. 425).

The University of Texas has been in existence since the last century. The law school has been in existence for more than fifty years and is recognized and accredited by every association in the field (R. 90-91). The Negro school had just been opened in March, 1947 and was not accredited by any agency (R. 96, 25).

Physical Plant

The proposed Negro law school was to be set up in the basement [3] of a building in downtown Austin consisting of three rooms of moderate size, one small room and toilet facilities (R. 36). There were no private offices for either the members of the faculty or the dean. The space for this law school had been leased for a period from March to August 31, 1947 at $125 a month, and the authorities were negotiating for a new lease after that period (R. 41). It was freely admitted that "there is no fair comparison in monetary value" between the two schools (R. 43). There was no assurance as to where the proposed law school would be located after August 31st, and it was not even certain as to what city it would be in after August 31st (R. 52-53).

Library

While the law school at the University of Texas had a well-rounded library of some 65,000 volumes (R. 133), the proposed Negro school had only a few books, mostly case books for use of first-year students (R. 21-22). However, the students at the proposed law school for Negroes had access only to the law library in the state capitol directly across the street, a right in common with all other citizens of the State of Texas (R. 45). A library of approximately 10,000 volumes had been requisitioned on February 25, 1947 (R. 40) but was not available for use at the time of the opening of the Negro school on March 10 nor at the time of the trial of this case (R. 44). The University of Texas law school had a full-time, qualified and recognized law librarian with two assistants (R. 139). The Negro law

[3] Pictures of the building of the Law School at the University of Texas and the basement quarters of the so-called Negro law school appear in the record at pages 385-387 and 389.

school had neither librarian nor assistant librarians (R. 74, 80, 128).

It was admitted that the library at the state capitol, a typical court library and not a teaching library, was not equal to the one at the University of Texas, and did not meet the standards of the Association of American Law Schools (R. 134, 138, 145). It was also admitted that even if the requisitioned books were actually obtained the library would not then be equal to the library already in existence at the law school of the University of Texas (R. 151).

Faculty

The University of Texas Law School has a faculty consisting of sixteen full-time and three part-time professors (R. 369-371). The proposed faculty for the Negro school was to consist of three professors from the University of Texas who were to teach classes at the Negro school in addition to their regular schedule at the University of Texas (R. 59, 84, 87).[4] The comparative difference in value between full-time and part-time law school professors was freely acknowledged and it was admitted that the proposed "faculty" did not meet the standards of the Association of American Law Schools (R. 59, 91-92).

Student Body

There were approximately eight hundred fifty students at the law school of the University of Texas (R. 76). From the record it appears that all qualified students other than Negroes were admitted. There were no students at the proposed Negro school at the date of opening nor at the time of the trial (R. 162). Although several Negroes had made inquiry concerning the school, none had applied for

[4] It was also shown that offices for the dean and faculty members involved were to remain at the University of Texas (R. 46-47).

admission (R. 162). If petitioner had entered this school he would have been the only student.

The law school of the University of Texas had a moot court, legal aid clinic, law review, a chapter of Order of the Coif, and a scholarship fund (R. 102-105). None of these were present or possible in the proposed Negro law school, and Charles T. McCormick, dean of the two law schools, testified that he did not consider these to be factors material to a legal education but rather, that they were "extraneous matters" (R. 106).

B

The Unreasonableness of Compulsory Racial Segregation in Public Legal Education

Dr. Robert Redfield, Chairman of the Department of Anthropology at the University of Chicago, testified as an expert, that there is no recognizable difference as to capacities between students of different races and that scientific studies had concluded that differences in intellectual capacity or ability to learn have not been shown to exist between Negroes and other students. He testified that as a result of his training and study in his specialized field for some twenty years, it was his opinion that given a similar learning situation with a similar degree of preparation, one student would do as well as the other, on the average, without regard to race or color (R. 192-194).

Dr. Redfield testified further that the main purpose of education is to develop in every citizen, in accordance with the natural capacities of such citizen, the fullest intellectual and moral qualities and the most effective participation in the duties of citizenship (R. 192).

Dean Earl G. Harrison of the University of Pennsylvania Law School, testifying as an expert in the field of

legal education, summed up the purposes of legal education as follows: "The studies that I have reference to have pointed out in general that there are four objectives of law school education. One is, of course, to prepare the practitioner. Second, is to prepare and train law teachers. Third, is to train and prepare men for legal research, and the fourth objective is to train and prepare men and women for public service" (R. 220).

Professor Malcolm Sharp of the law faculty of the University of Chicago testified as an expert in the field of legal education and explained in detail the purposes of legal training for public service giving examples of the benefits to society of Negro lawyers trained for public service in non-segregated law schools (R. 344-346).[5]

The experts on legal education also testified as to the patent inequality between the two law schools and the impossibility of equality between the schools. They agreed that it was absurd to speak of any institution that has one student as a law school (R. 216-217, 349-350). They stressed the need for competition among students of all classes as an absolute necessity for a legal education (R. 218, 344, 347). They testified that moot court, Order of the Coif, scholarship fund, law reviews and legal aid clinics were most important for a well-rounded legal education and that they were "not by any means extraneous" (R. 221, 347).

---

[5] "Q. Now, as a result of your studies and your teaching experience, along with your experience in the Association of American Law Schools, would you state briefly the recognized purposes of a law school as of today?

"A. The purpose of a law school is, of course, first; to train for practice of the profession in the familiar way. The second purpose has been becoming more and more important, as all of the leading schools have recognized, training for positions of public service; as lawyers are called on to fill, to a marked extent, administrative agencies, the bench, legislative positions. The schools are paying more and more attention to training for that purpose. Of course, the training of teachers and scholars in the field."

These expert witnesses also testified that a sizeable body of students of all races, classes and walks of life was of major importance to an adequate legal education. They denied that one Negro or a few Negroes at a segregated law school could under any circumstances obtain a legal education equal to that obtained at the University of Texas (R. 227, 343, 344, 347, 350, 351, 352).

Each of the expert witnesses offered by the petitioner testified that compulsory racial segregation in public education not only made it impossible for the Negro to get an education equal to that offered to the students in the other school but was harmful to the segregated Negro students, the students in the other schools, and the community in general (R. 194-196, 198-199, 227, 341).

C

Inequalities Inherent in Segregated School Facilities

The petitioner offered in evidence several reports of governmental agencies, federal and state, showing without exception the inequalities in educational facilities in segregated schools throughout the states where segregated schools are required (R. 248). The petitioner also offered the testimony of Dr. Charles Thompson, documented by recognized governmental reports, showing conclusively that wherever separate schools were maintained under state law for Negro students, these schools were without exception inferior to the schools maintained for students of other racial groups. The comparison was broken down into each category recognized by educators as valid for comparison purposes (R. 228-283).[6] An appendix showing

[6] Dr. Thompson's testimony was admitted into the record but by final order of the District Judge was ordered stricken from the record as being beyond the scope of the pleadings and issues and immaterial and irrelevant (R. 441).

in detail the inequalities in segregated school systems is filed herewith as "Petitioner's Appendix".

Petitioner also offered the testimony of Donald G. Murray who had been admitted to the law school of the University of Maryland as a result of legal action and who was the first Negro to be admitted to a law school in a state where segregation is required in public schools. Objection to this testimony was sustained but the testimony was placed in the record on a bill of exceptions (R. 288). This testimony showed that although dire consequences were predicted by state officials of Maryland if Murray was admitted to the law school, it developed that his admission brought about no untoward results (R. 288-291).

PART TWO

OPINION OF THE COURT BELOW

The Court of Civil Appeals in affirming the judgment of the lower court based its decision on existence of and the validity of the state's policy of segregation and found that "the State at the time of the trial had provided and made available to Relator a course of instruction in law as a first year student, the equivalent or substantial equivalent in its advantages to him of that which the State was then providing in the University of Texas Law School. We are not dealing here with abstractions but with realities" (R. 449). The judgment of the Supreme Court of Texas refusing application for writ of error (R. 446) and order overruling motion for rehearing were made without an opinion (R. 47). The opinions of the trial court are discussed in Part One.

PART THREE

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, section 1257 this being a case involving rights secured under the Fourteenth Amendment. Petitioner's cause is founded upon rights secured by the Constitution of the United States.

PART FOUR

QUESTION PRESENTED

May the State of Texas Consistently With the Requirements of the Fourteenth Amendment Refuse to Admit Petitioner Because of Race and Color to the University of Texas School of Law?

PART FIVE

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I

The courts of Texas, and of many states, while pretending to observe the requirements of equal protection of the laws in educational matters, approve the exclusion of Negroes from adequate public law schools, thus denying to large numbers that equality of educational opportunity which is the very foundation of democracy. The courts' theory presupposes that the equality guaranteed by the Fourteenth Amendment can be realized in a pattern of compulsory racial segregation in public education. The extent of this practice and the severity of its impact on the community are such as to warrant consideration by this Court.

II

The court below relied on *Plessy* v. *Ferguson*. The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy* v. *Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions including *Oyama* v. *California*, *Shelley* v. *Kraemer*, *Takahashi* v. *Fish & Game Commission* should lead this Court to review the correctness of the doctrine of *Plessy* v. *Ferguson* and overrule it.[7]

III

This Court should review and reverse the judgment below to prevent the several states from being free to restrict Negroes to public educational facilities clearly inferior to those provided for all other persons similarly situated through the device of arbitrary judicial decision that such discriminatory action provides "substantial equality".

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the court below, should be granted.

W. J. DURHAM,
WILLIAM H. HASTIE,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
THURGOOD MARSHALL,
Attorneys for Petitioner.

ROBERT L. CARTER,
E. B. BUNKLEY, JR.,
HARRY BELLINGER,
U. S. TATE,
Of Counsel.

---

[7] *Plessy* v. *Ferguson*, 163 U. S. 537; *Oyama* v. *California*, 332 U. S. 633; *Shelley* v. *Kraemer*, 334 U. S. 1; *Takahashi* v. *Fish and Game Commission*, 332 U. S. 410. As to this Court's disapproval of unreasonable classifications generally, see, for example, *Colgate* v. *Harvey*, 296 U. S. 404.

IN THE

Supreme Court of the United States

October Term, 1948

No.

HEMAN MARION SWEATT,
Petitioner,
vs.
THEOPHILIS SHICKEL PAINTER, *et al.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Opinion of the Court Below

The opinion of the Court of Civil Appeals can be found at page 445 of this record, and that of the District Court of Travis County is reported at page 438.

Jurisdiction

Jurisdiction of this Court rests upon Title 28, United States Code, Section 1257. The District Court of Travis County entered judgment for respondents on June 17, 1947.

Judgment was affirmed by Court of Civil Appeals, February 25, 1948. Application for writ of error was refused by Supreme Court of Texas on September 29, 1948 (R. 466). Motion for rehearing was overruled on October 27, 1948 (R. 471). On January 12, 1948 this Court extended the time for filing this petition for writ of certiorari until March 23, 1949 (R. 472).

Statement of the Case

Pertinent facts involved in this case are set out in the petition itself, and therefore, are not restated here.

Errors Relied Upon

The Court erred in refusing to consider evidence showing discriminatory features inherent in enforced racial separation at the professional school level.

The Court erred in predicating its decision upon *Plessy v. Ferguson* and in disregarding principles serving the basis for more recent decisions of this Court in conflict with the rationale of that case.

The Court erred in refusing to hold that the racial classification here complained of was arbitrary and unreasonable within the meaning of the Fourteenth Amendment.

The Court erred in finding that the law school for Negroes at Austin was the "equivalent or substantial equivalent of the law school of University of Texas".

The Court erred in finding that the constitutional and statutory provisions of the State of Texas requiring segregation in public education were consistent with the requirements of the Fourteenth Amendment.

ARGUMENT

I

The question whether a state which undertakes to provide legal education for any of its citizens can satisfy the requirements of the equal protection clause of the Fourteenth Amendment by establishing a law school for Negroes separate from the law school it provides for all other persons is of great public importance and should be decided by this Court in this case.

The education of the youth of our nation, formerly the responsibility of the parent, has now become a recognized function of government. This has become a matter of national importance. The individual states have provided public education through the graduate and professional school levels. Most of the states provide educational facilities without regard to the race or creed of the student. However, seventeen of the states have insisted upon either the complete exclusion or the segregation of Negroes in public education.[1] The record of these states has brought down the national level of education. The question of the legality of such racial segregation, which amounts to actual exclusion from the regular recognized state university, is of great public importance.

The seventeen southern states where a pattern of educational segregation is sanctioned and enforced by state law comprise the area of our country which is least able to afford either the financial or the educational hazards created by a dual system of education. The burden on the treasury in maintaining a dual system of education cannot help but

[1] Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

be reflected in a deprivation of educational opportunities and facilities for all groups.

The impact of this policy of segregation is felt not only by the minority group, but the nation as a whole. In the most critical period of June-July, 1943, when the nation was crying for manpower, 34.5% of the rejections of Negroes from the armed forces were for educational deficiency. Only 8% of the white selectees rejected for military service failed to meet the educational standards.[2]

The official War Department report on the utilization of Negro manpower in the postwar Army says that "in the placement of men who were accepted, the Army encountered considerable difficulty. Leadership qualities had not been developed among the Negroes, due principally to environment and lack of opportunity. These factors had also affected development in the various skills and crafts."[3]

Recognizing that segregation constitutes a menace to American freedom and was indefensible, the President's Committee on Civil Rights unequivocally recommended its elimination from American life.[4] In the same year, the

[2] *The Black and White of Rejections for Military Service*, Montgomery, Ala., American Teachers Association, 1944, p. 5.

[3] Report of Board of Officers on Utilization of Negro Manpower in the Post-War Army (February, 1946), p. 2.

[4] "To Secure These Rights", *The Report of the President's Committee on Civil Rights*, U. S. Government Printing Office, 1947, p. 166. "The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facilities for minority peoples. Finally, it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together. There is no adequate defense of segregation." *Ibid.*

President's Commission on Higher Education, in its report on education in the United States said:[5]

> "The time has come to make public education at all levels equally accessible to all, without regard to race, creed, sex or national origin."

This, too, is the almost unanimous conclusion of scholars and students who have studied the problem.

The professional skills developed through graduate training are among the most important elements of our society. Their importance is so great as to be almost self-evident. Teachers pass on skills and knowledge from one generation to another. Engineers create and service the technology that has been bringing more and more good to more and more people. Doctors and dentists guard the health of their people. Lawyers guide their relationships in a complicated society.

Racial inequality in education has resulted in a loss to the nation of the development of these professional skills in a great part of our population. Because of the limited opportunities open to Negroes in professional education, in the United States in 1940, there was one white physician for every 735 white citizens, but only one Negro doctor for every 3,651 Negroes.[6] And one white lawyer served 670 whites, but there was only one colored lawyer for every 12,230 Negro citizens.[7] In the petitioner's native state of Texas, the same deprivation of professional services exists. In 1940 in Texas, one white lawyer served 709 whites,

---

[5] "Higher Education for American Democracy". *A Report of the President's Commission on Higher Education*. U. S. Government Printing Office: Washington, December, 1947, p. 38.

[6] Journal of Negro Education (1945), Vol. XIV, Fall number, p. 511.

[7] *Ibid*, p. 512.

whereas there was only one Negro lawyer for every 40,191 Negroes.[8]

Perhaps even more important than the barriers which segregation offers to the development of leadership and professional skills is its corrosive effect upon the fundamentals of a democratic society. Neither white nor Negro Americans can maintain complete and full allegiance to the basic tenet upon which our government is founded—"that all men are created equal"—when pupils are being forcibly kept apart in the public schools because of their racial identity.

It is essential for the successful development of our country as a nation of free people that the sympathies and tolerance which we wish practiced in later life be fostered in the classroom. "And since according to our institutions, all classes meet, without distinction, in the performance of civil duties, so should they all meet, without distinction of color, in the school, beginning there those relations of equality which our Constitution and laws promise to all."[9]

Enforced separation in the law school, moreover, is particularly pernicious because of the vital importance which the lawyer maintains in our society. Law is "a public profession charged with inescapable social responsibilities."[10] The prime purpose of legal training must be not merely, as Mr. Justice HOLMES has said, "to make men smart, but to

---

[8] *Based on data in Sixteenth Census of the United States*: Population, Vol. III, Part 4, Reports by States (1940).

[9] Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of *Sarah C. Roberts v. Boston*, 1849, pp. 29-30.

[10] Simpson, "The Function of a University Law School", 49 Harv. L. Rev. 1068, 1072.

make them wiser in their calling",[11] and "to train men for public service."[12]

The testimony of the expert witnesses in legal education called by the petitioner[13] is amply supported by other experts. Eminent authorities in the field of legal education have demonstrated that there are certain features of a law school which are necessary to a proper legal education which can only be found in a full-time, accredited law school.[14] Some of these are: a full-time faculty,[15] a varied and inclusive curriculum,[16] an adequate library, well-equipped building and several classrooms,[17] a well-established, recognized law review and a moot court.[18]

Equally essential to a proper legal education in a democratic society is the inter-change of ideas and attitudes which can only be effected when the student-body is representative of all groups and peoples. Exclusion of any one

---

[11] Holmes, "The Use of Law Schools" in Collected Legal Papers (1920), pp. 39-40.

[12] Malcolm Sharp, testimony at p. 341 in Record. See also McCormick, "The Place and Future of the State University Law School," 24 N. C. L. Rev. 441, "As we rebuild our curricula, it seems that more attention should be given to the knowledge that a lawyer needs in order to be a community leader—such matters as planning, zoning, and housing come to mind—and to the adaptation of the public law courses not only to the needs of the lawyer serving private clients, but to the requirements of graduates who will enter the service of the state and national governments."

[13] The testimony of these witnesses is summarized in the petition at pages 9 to 11.

[14] See Boyer, "Smaller Law Schools: Factors Affecting Their Methods and Objectives," 20 Oregon Law Rev. 281 (1941).

[15] *Ibid.*

[16] *Ibid.*

[17] Townes, "Organization and Operation of a Law School," 2 Am. Law School Rev. 436 (1910); Ballantine, "The Place in Legal Education of Evening & Correspondence Law Schools," 4 Am. Law School Review 369 (1918).

[18] See Boyer, "Smaller Law Schools: Factors Affecting Their Methods and Objectives," 20 Oregon Law Rev. 281 (1941).

group on the basis of race, automatically imputes a badge of inferiority to the excluded group—an inferiority which has no basis in fact.[19] The role of the lawyer, moreover, is often that of a law-maker, a "social mechanic", and a "social inventor."[20] A profession which produces future legislators and social inventors to whom will fall the social responsibilities of our society, can not do so on a segregated basis.[21]

It is evident that even if it were possible to construct a law school building for Negroes equal in all respects to the one now in existence at the University of Texas with a library equal in all respects, with a faculty of equal number and equal ability (if possible), the separate law school could not meet the recognized requirements set out above. Actually, in so far as legal education is concerned, an equal education is impossible in a jim-crow law school.

Even apart from this, it is absurd to speak of a school with only one student as a law school. In the field of legal education, even more so than in other fields of public education, the blind adherence to the practice of compulsory racial segregation not only deprives the individuals involved of the equality of law, but deprives the state and the nation of properly trained specialists necessary to our government.

---

[19] "The Black and White of Rejections for Military Service," American Teachers Association, August, 1944, page 29; Otto Klineberg, "Negro Intelligence and Selective Migration," New York, 1935; J. Peterson & L. H. Lanier, "Studies in the Comparative Abilities of Whites and Negroes," *Mental Measurement Monograph*, 1929.

[20] Simpson, "The Function of a University Law School," 49 Harv. L. Rev. 1068, 1072. See also McCormick, "The Place and Future of the State University Law School," 24 N. C. L. Rev. 441.

[21] Simpson, op. cit., p. 1069. See also Stone, "The Public Influence of the Bar," 48 Harv. L. Rev. 1.

II

The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy* v. *Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions should lead this Court to review and disavow the doctrine of *Plessy* v. *Ferguson*.

In upholding the denial of petitioner's application for a writ of mandamus, the Court of Civil Appeals said: "The validity of state laws which require segregation of races in state-supported schools, as being, on the ground of segregation alone, a denial of due process, is not now an open question. The ultimate repository of authority to construe the Federal Constitution is the Federal Supreme Court. We cite chronologically, in a note below, the unbroken line of decisions of that tribunal recognizing or upholding the validity of such segregation as against such attack." In support of this proposition, *Hall* v. *DeCuir*, 95 U. S. 485; *Plessy* v. *Ferguson*, 163 U. S. 537; *Cummings* v. *County Board of Education*, 175 U. S. 528; *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Gong Lum* v. *Rice*, 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631 were cited.

Plessy v. *Ferguson* raised in this Court for the first time the question of the constitutionality of a state statute enforcing segregation based upon race and color. In that case, a Louisiana statute requiring the separation of Negro and white passengers was held to be consistent with the equal protection clause of the Fourteenth Amendment. Yet the opinion appears to rely heavily upon the leading state case in this field—and the only one of the cited cases dis-

cussed in the majority opinion[22]—*Roberts* v. *Boston*, 5 Cush. (Mass.) 198 (1849), decided almost twenty years before the adoption of the Fourteenth Amendment. Yet, it was the very diversity of opinion, so pronounced in 1849, on the reasonableness of legal distinctions based on race which the Fourteenth Amendment sought to settle. Antebellum justifications of segregation have no more logical place in the interpretation of the Fourteenth Amendment than antebellum notions of voting restrictions have in defining the scope and meaning of the Fifteenth Amendment.

In addition, *Plessy* v. *Ferguson* was decided upon pleadings which assumed a theoretical equality within segregation rather than on a full hearing and evidence which would have revealed equality to be impossible under a system of segregation.

An examination of the other decisions of this Court upon which the lower court relied shows that the doctrine of *Plessy* v. *Ferguson* has not been reexamined nor seriously challenged.

In *Cummings* v. *Board of Education*, *supra*, the issue of the validity of the segregation statute was not even raised. In fact plaintiffs there acquiesced in the use of taxes levied to support segregated schools at the elementary and intermediate grammar school levels. The main purpose of the suit was to secure an injunction forcing the discontinuance of a high school for whites since no school was being maintained for Negroes. This remedy the Court considered improper.

In *Gong Lum* v. *Rice*, *supra*, again the question was not raised. The primary issue there was whether a Chinese

---

[22] Other cases cited in the opinion include: *People* v. *Gallagher*, 93 N. Y. 438; and *Ward* v. *Flood*, 48 Cal. 36; *State, Garnes* v. *McCann*, 21 Ohio. St. 210; *Lehew* v. *Brummell*, 103 Mo. 546; *Cory* v. *Carter*, 48 Ind. 337; *Dawson* v. *Lee*, 83 Ky. 49.

could be excluded from the white schools under the segregation statutes of Mississippi, and could be classified as a colored person and required to attend the Negro school.[23]

In the *Gaines* case, *supra*, although the doctrine of *Plessy* v. *Ferguson* was repeated, it was neither examined nor applied. There the main issue before the Court was whether a qualified Negro applicant could be excluded from the only state supported law school. The Court decided that question in the negative.

In *Sipuel* v. *Board of Regents*, *supra*, the doctrine of *Plessy* v. *Ferguson* was neither raised, examined, repeated nor applied. The Court specifically stated that the appellant was entitled to receive educational benefits at the same time and as soon as it was offered to applicants of any other group. Moreover in *Fisher* v. *Hurst*, 333 U. S. 147, the same case, *supra*, this Court was asked to issue an original petition for a writ of mandamus to compel compliance with its mandate there. The Court denied the writ on the grounds that the original *Sipuel* case had specifically not raised the issue of the validity of the segregation statutes and that procedurally the question could not be considered on the petition for writ of mandamus.

---

[23] It is true that Mr. Chief Justice TAFT, op. cit., supra, at page 85 in discussing the issue said: "Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the State Legislature to settle without intervention of the Federal Courts under the Federal Constitution." Therefore, even if this decision is construed as raising the issue of the validity of school segregation statutes, it is clear that the doctrine was not examined and that *Plessy* v. *Ferguson* was relied upon without question.

This is the group of cases upon which the separate but equal doctrine under the Fourteenth Amendment is said to depend.[24] The inconsistencies between the "separate but equal" doctrine of *Plessy* v. *Ferguson* and the reasoning and holdings of a considerable body of decisions of this Court become readily apparent when analysis is made in terms of the fundamental question, common to all, whether racial differences can be made the bases for legislative distinctions in the face of the Fourteenth Amendment. Except in *Plessy* v. *Ferguson, supra*, and the decisions which rely uncritically upon it, this Court has consistently concluded that the Fourteenth Amendment prohibits the states from making racial differences and other arbitrary distinctions the bases for general classifications. This impressive and carefully considered group of cases includes: *Takahashi* v. *Fish & Game Commission*, 332 U. S. 410, 420 L. ed. 1096, 1101; *Oyama* v. *California*, 332 U. S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U. S. 1, 20, 23; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374; *Buchanan* v. *Warley*, 245 U. S. 60, 82; *Hill* v. *Texas*, 316 U. S. 400, 404; *Strauder* v. *West Virginia*, 100 U. S. 303, 307, 308; *Truax* v. *Raich*, 239 U. S. 33, 41, 42;

---

[24] Another case in point but not relied upon by the court below is *Berea College* v. *Kentucky*, 211 U. S. 45. That case appears to accept the doctrine insofar as the power of the state to place conditions on a corporate charter. *Hall* v. *DeCuir, supra; McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Mitchell* v. *United States*, 313 U. S. 80 were decided under the Commerce Clause of the Federal Constitution and need not be considered in a decision as to the validity of the equal but separate doctrine within the meaning of the Fourteenth Amendment. The foundation of even those cases, however, seems to have been shaken. Compare *Morgan* v. *Virginia*, 328 U. S. 373; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

Virginia v. *Rieves*, 100 U. S. 313, 322; *Ex Parte Virginia*, 100 U. S. 339, 344, 345.[25]

These cases merely apply to racial distinctions the general constitutional principle applicable in all other areas. Their rationale is merely a part of and consistent with the basic principle that all governmental classifications must be based upon a significant difference having a reasonable relationship to the subject matter of the statute. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417; *Gulf Colorado & Sante Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 155; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559, 560; *Atchison Topeka & Santa Fe Railway Co.* v. *Vosburg*, 238 U. S. 56, 60, 61; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 416, 417; *Smith* v. *Cahoon*, 283 U. S. 553, 566, 567; *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U. S. 459, 462, 463; *Colgate* v. *Harvey*, 296 U. S. 404, 422, 423; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 274; *Skinner* v. *Oklahoma*, 316 U. S. 535, 541, 542; *Louisville Gas & Electric Co.* v. *Cohen*, 277 U. S. 32, 37; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400; *Powers Mfg. Co.* v. *Saunders*, 274 U. S. 490, 493; *Truax* v. *Corrigan*, 257 U. S. 312, 337; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 106, 107.

---

[25] *Takahashi* v. *Fish & Game Commission*; *Yick Wo* v. *Hopkins* and *Truax* v. *Raich* involved the right to engage in a useful occupation. *Oyama* v. *California*, *Shelley* v. *Kraemer* and *Buchanan* v. *Warley* involved the right to own, occupy, sell and lease real property. *Hill* v. *Texas*, *Strauder* v. *West Virginia*, *Virginia* v. *Rieves* and *Ex Parte Virginia*, involved the right of Negroes to be free of discrimination in the selection and composition of grand and petit juries.

Despite the different problems involved, the Court made the same fundamental approach to each case. Underlying each decision is the basic proposition that race alone cannot be a valid criterion upon which to sustain governmental action under the 14th Amendment. Finding on examination that the real purpose and effect of the state's action was racial discrimination, no difficulty was encountered in declaring the action unconstitutional.

Neither the decision nor the rationale of *Plessy* v. *Ferguson* can be reconciled with this impressive body of authorities.

The Court below in relying on *Plessy* v. *Ferguson* and in ignoring this body of cases has improperly and mistakenly construed the limitations of the Fourteenth Amendment as applied to the instant case. For not only is *Plessy* v. *Ferguson* inconsistent with many decisions of this Court, but it was wrongly decided. In sustaining a statute based upon a difference in the color of citizens, this Court made a radical departure from the body of cases, cited *supra*, under which such a distinction would have necessarily been construed as arbitrary and therefore unlawful. In requiring that a classification be based upon a significant difference having a reasonable relationship to the subject matter of the statute, that body of decisions rests upon a sound foundation. The same principle should be controlling in the instant case. Any other approach makes the equal protection clause meaningless. Insofar as *Plessy* v. *Ferguson* affects the application of that principle to the instant case, it should not be followed.

III

This Court should review and reverse the judgment below to prevent the several states from being free to restrict Negroes to public educational facilities clearly inferior to those provided for all other persons similarly situated through the device of arbitrary judicial decision that such discriminatory action provides "substantial equality".

Texas and sixteen other states have insisted that public education can only be furnished on a basis of racial distinc-

tion between students. The purpose of this practice is to exclude Negroes from the recognized state educational institutions. The record in this case, as in other cases, will demonstrate that these states first establish facilities for non-Negroes. Later, either as a result of legal action or other compulsion, separate institutions have been established for Negroes.

The record in this case, the record in similar cases, governmental and private studies, demonstrate clearly that the separate Negro facilities are never equal to the facilities established for other groups. In short, we have been unable to find a single recognized study of public education on a segregated basis which reveals equality of opportunity as between the segregated and now segregated schools. The Negro school is invariably an inferior school.

The "separate but equal" doctrine of *Plessy* v. *Ferguson*, relied upon by Texas and the other southern states is based on the hypothesis that equal facilities can be realized in a segregated school system. The record in this case and in other cases has demonstrated the invalidity of such a hypothesis. It is clear not only that the doctrine of "separate but equal" has not produced equality, but can never provide the equality required by the Fourteenth Amendment.

This separate but equal doctrine has brought about constant and continual litigation. Negroes have gone to the courts in Missouri,[26] South Carolina,[27] Tennessee,[28] Louisi-

---

[26] *Missouri, ex rel. Gaines* v. *Canada, supra; Bluford* v. *Canada*, 32 F. Supp. 707 (1940) (Appeal dismissed 119 F. (2d) 779 (C. C. A. 8th)).

[27] *Wrighten* v. *Board of Trustees*, 72 F. Supp. 948.

[28] *State, ex rel. Michael* v. *Whitham*, 179 Tenn. 250, 165 S. W. (2d) 378 (1942).

ana,[29] Oklahoma;[30] Maryland,[31] Kentucky,[32] and Texas in order to secure educational advantages equal to those being offered to all other qualified persons. The formula constantly invites such court action. In all instances this has meant loss of time and years out of an individual's career, while his case pursues its way through the courts. This very fact shows the weakness of the doctrine.

The states are more interested in maintaining segregation than in affording equality. Hence the separate but equal doctrine has now become the "separate but substantially equivalent" doctrine. The record in this case is a clear example of the circuitous route forced upon a Negro litigant seeking only to enforce a right recognized as belonging to every other qualified applicant except those who happen to be Negroes.

Petitioner in this case applied for admission to the existing state law school on February 26, 1946. All qualified students other than Negroes who applied at the same time and who successfully passed their examinations are now either practicing law or are ready to take the bar examination for that purpose. On the other hand, the petitioner, solely because of his race and color, after long, extended and involved litigation is still without a legal education.

---

[29] *Louisiana, ex rel. Hatfield* v. *Louisiana State University* (File 25,520, State Court for the 19th Judicial District).

[30] *Sipuel* v. *Board of Regents, supra; Fisher* v. *Hurst, supra; McLaurin* v. *Oklahoma State Regents*, No. 614, U. S. Supreme Court, Oct. Term, 1948.

[31] *Pearson* v. *Murray*, 169 Md. 478, 182 Atl. 590 (1936).

[32] *Johnson* v. *Board of Trustees* (File No. 625, U. S. Dist. Court for the Eastern Dist. of Kentucky).

At the first hearing in this case, although the trial court concluded that petitioner had been denied rights guaranteed by the Constitution, nevertheless, because of the separate but equal doctrine, it refused to issue the order for the necessary relief and allowed the state six months in which to set up the facility separate from that in existence at the University of Texas. At the end of the six months' period the trial court again reverted to the separate but equal doctrine and found that petitioner had been given substantially equivalent educational opportunities to that afforded to whites at the University of Texas on the mere promise of the state to establish a law school for Negroes in Houston.

At the third hearing, this same court in the face of petitioner's testimony which conclusively established that the facilities in the basement law school at Austin, faculty, library and in all respects were in no way equal or substantially equivalent to the law school at the University of Texas found that this makeshift school established over night in a basement of a building afforded to petitioner "equal if not better opportunities for the study of law," than he could obtain at the University of Texas.

The Court of Civil Appeals in the face of this clear evidence showing that the Negro school was inferior to the white school agreed with the petitioner that there could be no substantial equality, the two words being incompatible in themselves, but said the Court:

> "This is of course true in pure, as distinguished from applied, mathematics. 'Equality' like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature;

> at least not demonstrably so. Equations in nature are manifestly only approximations (working hypotheses); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the fourteenth amendment, employ the expressions 'equal' and 'substantially equal' and as synonymous" (R. 449).

The most authoritative studies made on public education in the United States clearly indicate that the Negro institutions are vastly inferior to the whites. Yet when faced with the necessity of holding Negro institutions to be inferior to the white and therefore to order the admission of the Negro to the white institution, courts have fallen back on the formula "substantially equivalent" to justify their decision to refuse the admission of the Negro into the white institution.

If it were not for the constitutional and statutory provisions requiring segregation in public education in Texas, there could be little doubt that the lower courts would have ordered the admission of the petitioner. If it were not for the existence of the "separate but equal" doctrine, the lower courts would have had no difficulty in declaring that said constitutional and statutory provisions were unreasonable classifications and therefore unlawful. But for the "separate but equal doctrine", the Texas courts would not have been able to justify the Negro law school as "substantially equivalent" and would have declared the constitutional and statutory provisions to be unreasonable classifications in violation of the Fourteenth Amendment.

Therefore, the only way for the petitioner in this case and other qualified Negroes to obtain a legal education equal

to that obtained by all other qualified applicants is by admission to the recognized state institutions. The only way this can be accomplished is for this Court to reconsider the doctrine of *Plessy* v. *Ferguson* and overrule it.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the court below, should be granted.

W. J. DURHAM,
WILLIAM H. HASTIE,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
THURGOOD MARSHALL,
Attorneys for Petitioner.

ROBERT L. CARTER,
E. B. BUNKLEY, JR.,
HARRY BELLINGER,
U. S. TATE,
Of Counsel.